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101st Congress *2d Session*	SENATE	REPORT 101-367

FAIR TRADE IN FINANCIAL SERVICES ACT OF 1990

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 2028

JULY 13 (legislative day, JULY 10), 1990.—Ordered to be printed

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Mr. RIEGLE, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

[To accompany S. 2028]

INTRODUCTION

On May 24, 1990, the Senate Committee on Banking, Housing, and Urban Affairs (the "Committee") marked up and ordered to be reported a bill, the Fair Trade in Financial Services Act of 1990. The bill amends the International Banking Act of 1978, the Securities and Exchange Act of 1934, and the Investment Advisers Act of 1940 in order to encourage foreign countries to offer United States financial institutions that operate or seek to operate in them *de facto* national treatment. The Committee reported the bill for favorable consideration by the Senate on a voice vote with only one vote, that of Senator Mack, recorded as opposing it.

PURPOSE OF THE LEGISLATION

The United States has for almost half a century offered foreign financial institutions the same competitive opportunities that domestic financial institutions enjoy in our market, regardless of how the parent countries of such foreign institutions treat U.S. financial institutions that seek to operate in them. Many foreign countries do not grant U.S. financial firms *de facto* national treatment. The purpose of the Act is to encourage those foreign countries to accord *de facto* national treatment to U.S. banks, brokers and dealers, and investment advisers and to end discrimination against U.S. financial institutions in foreign markets.

SUMMARY OF S. 2028

S. 2028 amends the International Banking Act of 1978, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. The bill is intended to encourage foreign countries to offer United States financial institutions that operate or seek to operate in those countries *de facto* national treatment: i.e., the same competitive opportunities (including effective market access) as are available in those countries' domestic financial institutions.

If foreign countries do not provide U.S. financial institutions with an opportunity to compete, including both *de jure* and *de facto* national treatment, the bill charges the Treasury Secretary to negotiate to obtain it. To strengthen the Treasury's hand in any negotiations, the bill permits U.S. banking and securities regulators, in consultation with the Treasury, to deny applications for regulatory approval filed by banking and securities firms from countries that discriminate against U.S. firms. Such denials would not force foreign financial firms to shrink their existing operations, but could limit their opportunities for future expansion. Before regulators could exercise the authority given them by this bill, however, the Secretary of the Treasury would have to publish in the Federal Register a determination that a foreign country was discriminating against U.S. financial institutions by denying them national treatment. This legislation would not require the Secretary to do so. On the contrary such action would be purely discretionary. Once the Secretary made a finding of discrimination against U.S. institutions, banking regulators would consult with the Treasury Secretary in making their judgments on applications for regulatory approval filed by institutions from the country practicing discrimination. This legislation would not require regulators to deny applications for approval. Such action would be within their discretion in consultation with the Treasury Secretary.

HISTORY OF S. 2028

On January 29, 1990, Senators Riegle, Garn, Dixon, Shelby, Graham, Kerry, Bryan, Heinz, D'Amato, Pressler, and Wirth introduced S. 2028, the Fair Trade in Financial Services Act of 1990. The Senate previously passed legislation similar to S. 2028 in 1987 as Title XV of S. 1409, the Senate version of which became the Omnibus Trade and Competitiveness Act of 1988, and again as part of S. 1886, the Proxmire Financial Modernization Act of 1988. The House did not adopt those provisions. On April 5, 1990, the Committee held a hearing on S. 2028. The witnesses at the hearing were: (1) the Honorable David C. Mulford, Under Secretary for International Affairs, U.S. Department of the Treasury; (2) Mr. David Silver, President of the Investment Company Institute, Washington, D.C.; (3) Mr. Eric Hayden, President of the Investor Bank and Trust Company of Boston, Massachusetts; (4) Mr. Charles Kim, President of the California Center Bank of Los Angeles, California, who represented the Independent Bankers Association of America; and (5) Mr. Gunter Pauli, Chief Executive Officer, European Services Industries Forum, Belgium, and a member-elect of the European Parliament. As noted above the Committee on May

24 reported out an amended version of S. 2028, both as a separate bill and as title IV of S. 1379.

BACKGROUND

Recent events have made it clear that a world economy dominated by Cold War confrontation is giving way to one of global market competition. World leadership in such an economy will be based on economic performance. If the United States cannot compete effectively in the new global market, our relative economic strength will decline, as will our capacity for world leadership. It is thus important for our country to consider more carefully the economic and trade implications of policies adopted during the Cold War era to determine whether they remain valid in a new age of global economic competition. The Committee is concerned that wise policies adopted to advance the interests of our nation in a prior age not be adhered to blindly so that they become unwise dogmas that hinder our nation's ability to respond to the challenges of the current period of history.

One area in which the United States is experiencing an increasing competitive challenge is in international banking and finance. During the 1950's and 1960's, U.S. banks dominated the global banking scene as they helped American companies finance their expanding export markets and funded the growth of overseas subsidiaries. In the 1970's, as the economies of Europe and Japan fully recovered from the war, many foreign banks also began to do business in the United States as companies from their countries expanded their export markets here. The United States, however, had no national policy dealing with the regulation of foreign banks in this country. As a result American banks rightfully began complaining that foreign banks actually enjoyed competitive advantages in their operations here. For example, foreign banks could branch and take deposits nationwide while the McFadden Act prohibited their American competitors from doing likewise.

THE INTERNATIONAL BANKING ACT OF 1978

The Congress responded by passing the International Banking Act of 1978, which established the rules under which foreign banks operate in America. That law was designed to establish a level playing field between American and foreign banks in this country. It did not discriminate against foreign banks and even grandfathered some of the competitive advantages they enjoyed. The Senate Banking Committee's 1978 report on that statute stated:

> Foreign chartered banks are accorded operating privileges in the United States which enable them to compete in the United States on terms which equal or exceed the domestic operating privileges of our own domestically chartered banks.

The report went on to state that with enactment of the International Banking Act of 1978:

> The United States has more than abided by the principle of national treatment for foreign banks operating here. . . . In contrast our domestic banks operating abroad have

> not always received equal treatment in foreign countries with their host country competitors.

The report noted that treatment of American banks abroad varied from country to country.

> European Common Market countries have been most receptive to the benefits of competition brought by American banks to their economies. Japan is a contrast. By the restrictive practices of its officials, American banks are competitively disadvantaged in Japanese banking markets. Not only are American banks limited in their branching abilities, but they are also deterred from soliciting local deposits.

While Congress was concerned in 1978 about the inconsistency between our national treatment policy and the differing policies of some of our competitors, it hoped these matters could be resolved by U.S. negotiators without further Congressional action. It did require the Treasury Department to report to Congress by 1980 on the extent to which American banks were denied national treatment in their banking operations abroad.

In 1978, when the International Banking Act was passed, American banks were still among the largest in the world and controlled the largest share of the international banking market. Two of the three largest banks in the world were American and U.S. banks made over 30 percent of all international loans. Five years later in 1983 U.S. banks still did 27 percent of cross border lending compared to 20 percent for Japan and 31 percent for European banks. But in 1988, U.S. banks did less than 15 percent of cross border lending compared to 38 percent for Japan and 31 percent for Europe. Now the largest U.S. banks ranks only 24th in the world in size.

Foreign banking institutions currently control over 25 percent of all banking assets booked in the United States. Japanese banks alone have 14 percent of all such assets. In some markets, such as California, Japanese banks have 25 percent of total assets. Furthermore, foreign bank loans in the United States are growing three times as fast as domestic bank loans. In contrast the share of banking assets held by American and all other foreign banks in Japan, while never large, has continued to decline. In recent years the U.S. share of the Japanese market has declined from 3 percent to 1 percent. Foreign banks on the whole have less than a 3 percent share of the Japanese market and that too is in decline.

The Committee does not contend that a denial of market access for U.S. financial institutions in key foreign markets is th chief cause of these trends. America's macro-economic policies in recent years have contributed to massive deficit in America's current account balances. This in turn has fueled the growth of foreign banks in this country and has contributed to the new problems U.S. banks now face in international competition. The Committee believes, however, for reasons that will be discussed below that a lack of competitive opportunity for U.S. financial institutions in certain important markets has contributed to these trends. It concluded, therefore, that the U.S. Government must be more aggressive in

ensuring U.S. financial institutions are not discriminated against in foreign markets.

IMPLICATIONS OF THE DECLINING STATURE OF U.S. BANKS

The figures cited above raise concerns about the future growth and health of U.S. financial institutions and also of U.S. exporters who rely on their financing support. Former Federal Reserve Governor Robert Heller stated in May 1988:

> If American banks disengage from the international arena, American businessmen will have to conquer new export markets without an important ally in the form of their own banks. The loss of that extra competitive edge may be costly in terms of foreign sales.

The Banking Committee voiced a similar concern in its report on the International Banking Act of 1978:

> American banks abroad can and should play a significant role in supporting American exports. The Committee is concerned with the uneven treatment accorded to American Banks abroad, particularly in contrast with the open reception of foreign banks have been given in our domestic market and its consequent effect on our balance of trade.

At a time in our history when American industry must export as never before in order to reverse large and persistent deficits in our current account balance our Government must make sure that our exporters enjoy the support of a competitive international banking sector, that is not impeded by foreign market barriers.

THE IMPORTANCE OF ACCESS TO FOREIGN MARKETS

Because U.S. banks are facing such a severe competitive challenge and their continued strength is critical to the health of the U.S. economy, it is important to ensure that their foreign challengers are not achieving some of their success through reliance on unfair trade practices or discrimination in foreign markets. A key concern is fair access for U.S. banks to foreign capital markets that offer lower cost capital than is available in United States markets. If U.S. access to such markets is limited or denied, the ability of our banks to pursue a global banking strategy and intermediate between markets is restricted, as is access of U.S. borrowers to lower cost funds. If foreign banks, in addition, make use of such funds to penetrate the U.S. market, they will enjoy a unilateral competitive advantage because of the higher profits they enjoy in protected home markets and through their ability to offer lower spreads and lower fees in this country. Under Secretary of the Treasury David Mulford spoke to this issue at the April 5 hearing on S. 2028. He stated:

> I have always had the view that one of the reasons we're in the business of opening the Japanese markets and getting them to liberalize their markets is that there is a very low cost of capital there . . . people have begun to look at the financial area as one in which the Japanese institutions are engaging in sort of an unfair practice because

> they work off of a cheap source of capital at home and use that, in a sense to expand their position overseas in much the same way that an industrial company might be accused of an unfair trading practice.

He also stated:

> [W]e have seen an expansion of Japanese institutions on a global basis that is very, very substantial. Where they have external markets, they have often done in the financial business what they do in other businesses, which is to go after market share by offering highly competitive, possibly in some cases, we fear, submarket terms.

Other witnesses at the April 5 hearing also emphasized this point. Mr. David Silver of the Investment Company Institute declared:

> There seems little doubt that foreign firms which develop and grow in the sheltered environment of a restricted market may benefit from the existence of a monopoly or oligopoly in their home market. The profits gleaned from growth in this protected environment may provide a significant boost to entry into another market such as the U.S.

Mr. Charles Kim, representing the Independent Bankers Association of America stated:

> Opening foreign markets may also address part of the reason for the extensive presence of foreign banks in the U.S. Some of these countries operate in a protected home market, subsidizing their activities and ability to increase their U.S. market share, and perhaps allowing them to conduct predator acquisitions.

Likewise, Mr. R. Taggart Murphy, an expert on Japanese financial markets now with Goldman-Sachs in Tokyo, wrote in "Power Without Purpose," an article which appeared in the March-April 1989 edition of the *Harvard Business Review:*

> Japanese commercial and investment bankers have succeeded overseas partly because of their diligence and attention to detail, but also because they can offer lower spreads and lower fees to borrowers thanks to the profits they enjoy from a cartel-like protected market at home.

When asked whether he agreed with Mr. Murphy's analysis on that point Under Secretary of the Treasury Mulford stated:

> I have acknowledged repeatedly, including in my *Financial Times* article of November 29, 1989, that Japanese banks have benefited significantly by interest rate restrictions in Japan. The substantial earnings Japanese banks have acquired in their regulated domestic market have enhanced their ability to pursue market share abroad aggressively.

So it seems clear that the United States has good reason to be concerned whether its financial institutions receive the same opportunities to compete in foreign markets that we grant foreign fi-

nancial institutions in our domestic market. This is important not ony to help exporters of U.S. goods, but also to ensure that our financial institutions do not lose market share at home because foreign firms are able to reserve funding advantages in their own countries to themselves and thus can compete more strongly here. This issue is important for the safety and soundness of our financial system, for if foreign banks use restricted access to cheap deposits or capital to undercut U.S. banks' pricing of loans and services, then U.S. banks are forced to go after higher risk business in order to maintain their profits. This creates increased risks for our deposit insurance funds which are ultimately backed by our taxpayers. The short tērm interests of consumers of financial services are not always the long term interests of our nation.

THE NATIONAL TREATMENT STANDARD

The principle of national treatment, as it is embodied in the International Banking Act of 1978, requires the Federal Government to treat foreign banks in the U.S. the same as U.S. banks. As noted above, in passing the 1978 Act Congress asked the Treasury to report on whether U.S. financial institutions receive that national treatment in their operations abroad. The original Treasury report was completed in 1979 and at the request of Congress has been updated twice, most recently in 1986. It was made a permanent quadrennial report in the 1988 Omnibus Trade Bill.

For purposes of the trade bill national treatment report and future financial services negotiations, the Banking Committee in S. 2028 has defined "national treatment" to make it clear that *de jure* national treatment reflected in formal laws and regulations is not satisfactory, and tht the United States expects *de facto* national treatment: i.e., an equality of competitive opportunity with domestic financial firms that is not frustrated by opaque or informal practices preventing effective market access. The distinction between *de jure* and *de facto* national treatment arises, for example, in the case of Japan. In its 1986 national treatment update the Treasury stated that "Japan has continued to provide national treatment for foreign banks" but then went on to report that:

> Despite major changes taking place in Japanese financial markets, foreign commercial banks continue to find Japanese markets difficult to penetrate and offering few competitive opportunities . . . the long standing problems foreign banks have had in funding themselves in domestic yen remain. The resulting funding and pricing practices make Japan a relatively uncongenial lending market for foreign banks. Foreign banks' small share of the loan market has declined modestly in the last three years.

The Treasury report suggested that while Japan gives foreign banks *de jure* national treatment, it does not really offer foreign banks a full opportunity to compete in the Japanese market in the same terms as Japanese firms and thus does not provide *de facto* national treatment.

It was in light of this discrepancy that, even before the 1986 Report, the Treasury began a series of still ongoing negotiations to persuade the Japanese to truly open their financial markets to for-

eign competition. Under Secretary of the Treasury David Mulford, who has conducted these negotiations on behalf of the U.S. Government, related his own frustration with the results of these talks in a November 29, 1989, article in the *Financial Times:*

> It is particularly disheartening to see foreign banks and securities firms blocked from offering internationally proven services and products in Japan. . . . Formal legal framework apart, foreign firms are also frustrated by opaque informal practices.

Mr. Mulford noted:

> [S]tatutory restrictions and regulatory practices continue to be a firm barrier to full access by foreign firms to the Japanese financial services industry. The situation invites Congressional action and risks exhausting the U.S. Treasury's patience with the slow evolution of the past six years.

At the Committee's April 5 hearing on S. 2028, Under Secretary Mulford stated that *de jure* national treatment must be distinguished from *de facto* national treatment:

> We firmly believe that it is not sufficient simply to remove blatant discriminatory barriers. Foreign firms should effectively enjoy the same competitive opportunities as domestic firms.

In response to a question from Chairman Riegle about whether Japan provides U.S. financial firms national treatment, Under Secretary Mulford stated:

> I have expressed my concern that barriers still exist which effectively prevent foreign firms from playing on a level playing field in Japan. *De jure* national treatment does not always result in *de facto* equality of competitive opportunity.

The bill reported by the Committee makes clear that *de facto* national treatment is what U.S. negotiators must seek, and it defines the term to mean the same competitive opportunities (including effective market access) as are available to another country's domestic financial institutions.

PRACTICES IN JAPAN

While S. 2028 would give U.S. officials the authority to negotiate for the equality to compete with domestic institutions in all foreign markets, a particular focus of discussion in the hearings and of U.S. Government financial service negotiations has been to seek such treatment in Japan. A range of Japanese domestic banking practices have been cited as haivng the effect, whether intentional or not, of disproportionately restricting foreign financial institutions and new entrants to Japan's financial markets. The specific Japanese practice that has been most widely cited as denying foreign financial institutions a fair opportunity to compete is the regulation of deposit interest rates. Because of the controls, foreign banks seeking to enter the banking market cannot bid for deposits

to establish a deposit base and are disadvantaged in other market sectors by being forced to rely on higher cost funds. Although in the last six years Japan has increased the percentage of deregulated deposits, it continues to regulate many types of bank deposits. Mr. Mulford of the Treasury stated at the April 5 hearing:

> Remaining interest rate restrictions should be removed. This would greatly reduce the cost-of-capital advantage Japanese banks enjoy over foreign financial institutions.

Some other Japanese practices that deny foreign firms an equality of competitive opportunity in Japan are:

1. Impediments to developing money market instruments which deny foreign banks an opportunity to fund themselves in domestic yen.

2. Certain laws, regulations, and practices which prohibit Japanese investors from gaining access to foreign markets and impede the entry of innovative foreign products to the Japanese market.

3. Other laws, regulations, and practices which limit the opportunities of foreign firms to manage pension funds and mutual funds in Japan. Speaking on this point Mr. David Silver stated at the April 5 hearing:

> [A]s regards mutual funds, Japan remains a "closed shop" with no movement toward a free market on the horizon.

4. A lack of transparency. Foreign firms are not given fair opportunities to participate in the process by which the Ministry of Finance develops official policies, regulations, and administrative guidance. Some firms claim that it is hard for them to even obtain clear written statements of the rules or policies once they are decided. Furthermore, the bureaucracy is empowered to "interpret" the law as it deems fit creating fears of arbitrary treatment in foreign firms if they question authoritative interpretations by government officials. Mr. Eric Hayden, who represented the Bank of America in Japan for several years, spoke on this issue at the April 5 hearing. He stated:

> [F]oreign financial firms remain frustrated by the lack of transparency in the process by which official regulations, policies, and administrative guidance are developed and implemented by the Ministry of Finance and the Bank of Japan. Clearly written policies remain the exception rather than the norm, thereby ensuring the bureaucracy monumental power to interpret the law as it deems fit, which includes the ability to intimidate financial firms. One phone call is all it takes to make a point and keep the recipient in tow.

This list of practices is only meant to be illustrative and is certainly not an exhaustive description of the type of foreign practices that this bill gives our negotiators the authority to address in Japan and other markets where U.S. firms are presently denied equality of competitive opportunity with domestic firms.

UNCONDITIONAL MARKET ACCESS VERSUS RECIPROCAL NATIONAL TREATMENT

The Treasury Department prefers to continue the present U.S. policy of unconditional national treatment whereby we take no action against trading partners that discriminate against U.S. firms. In voicing that position, Mr. Mulford admitted that most of our other major trading partners already have or were moving from unconditional national treatment to reciprocal national treatment policies. He noted that Japan is among those countries:

> Japan's banking law does contain language which requires the Minister of Finance, in reviewing a foreign institution's banking license applications to examine whether Japanese banks are entitled to equivalent status in the foreign country.

The European Community (EC) in its Second Banking Directive has adopted a *reciprocal* national treatment standard. Article 9(4) of the final directive adopted on December 15, 1989, permits the EC to retaliate against third countries if its financial institutions "do not receive national treatment offering the same competitive opportunities as are available to domestic credit institutions and the conditions of effective market access are not fulfilled." EC officials have stated that the new Article 9(4) is intended to ensure that the current internationally accepted standard of "national treatment" should work in practice to ensure effective market access in third countries; that is, *de facto* not just *de jure* national treatment. Sir Leon Brittan, Vice President of the European Commission for Financial Services and Competitive Policy, spoke about this in a May 1, 1989, speech in Phoenix, Arizona to the Bankers Association for Foreign Trade. He stated:

> We will only seek to hit back and exclude new banks from third countries entering the community market where there is *de facto* or *de jure* national discrimination against our banks in the third country concerned.

EC officials have acknowledged that their institutions receive *de facto* national treatment in the United States. This does not mean EC officials will refrain from attempting to negotiate an end to structural barriers, such as the Glass-Steagall Act, that make the U.S. financial market more restricted than their own. Article 9(3) of the Second Banking Directive provides for such negotiations, but article 9(3)—in contrast with 9(4)—does not provide for any action against U.S. banks if the United States retains restrictions such as the Glass-Steagall Act. Sir Leon Brittan likewise spoke to this point in the above noted Phoenix speech. He stated:

> Where our partners have banking laws which are effectively non-discriminatory, but less liberal than our own, that will be a legitimate matter for negotiation. We will be fully entitled to argue that our most liberal banking market sets an example which our major trading partners should follow. But we would not invoke the lack of equivalent treatment as a basis for retaliation. To be very specific, in the case of United States legislation, there will be no

> sanctions against U.S. banks in the community because of the Glass-Steagall Act or any measures which restrict community banks' activities here so long as they are genuinely non-discriminatory between domestic and foreign banks.

LEVERAGE FOR TREASURY NEGOTIATORS

An important issue related to the increasing reliance of other governments on a reciprocal national treatment standard is the extent to which U.S. negotiators are presently at a disadvantage in negotiating market liberalization abroad.

Witnesses at the April 5 hearing strongly supported the passage of S. 2028 in order to give U.S. negotiators increased leverage in their efforts to open foreign financial markets. Mr. David Silver of the Investment Company Institute stated:

> Our government should not be obligated to follow a supine policy of granting unconditional national treatment and market access to foreign financial institutions without regard to the treatment of U.S. institutions in the home country of such foreign institutions.

Mr. Eric Hayden, who, as noted above, spent over seven years in Japan working for the Bank of America, declared:

> Our government negotiators have long been at a disadvantage in gaining access for U.S. institutions to foreign financial markets because they lack the power to invoke reciprocity. One of the great frustrations of all of us in the expatriate American banking community in Japan was the realization that any hope of change depended in large part on our ability to persuade the Japanese of the benefits to Japan of such change. It was as obvious to the Japanese as it was to us that, despite the support of our government officials, they had no meaningful levers to use on our behalf.

Mr. Guenter Pauli noted that the European Community had adopted its own reciprocal national treatment provision to give its negotiators increased leverage in their efforts to obtain equality of competitive opportunity in Japan. Based on his own extensive experience working in Japan, Mr. Pauli stated:

> Either you negotiate from a position of strength, or there is no negotiation at all. You end up asking favors. That applies in particular to negotiating with the Japanese for market access.

The bill reported by the Committee will allow U.S. negotiators to insist that our financial institutions enjoy an equality of opportunity to compete in another country if institutions from that country want similar treatment here.

APPLYING SANCTIONS TO FIRMS CURRENTLY OPERATING IN THE UNITED STATES

While S. 2028 was pending in Committee, concern was raised about whether existing foreign financial institutions in this country should be given a blanket exemption from any possible restric-

tions on expansion or new activities, even if their home country were found to discriminate against U.S. financial institutions. Such concern was prompted, in part, in consideration that the European Community's Second Banking Directive provides that EC financial institutions owned by U.S. persons will be free to expand their operations in accordance with EC and Member State laws, even if the United States were to change its present policy and fail to offer national treatment to EC financial institutions. While the Committee was sympathetic to the concerns raised about a grandfather for institutions from countries that had a record of open financial markets, it was not anxious to grandfather foreign institutions from countries that had a history of discriminating against entry by U.S. financial firms.

The Committee therefore adopted a compromise amendment at the mark up. The compromise provides that the Secreaty of the Treasury and the financial services regulators, in exercising their discretion to administer sanctions under the bill, should consider, with regard to institutions already operating in the United States, the parent country's record of providing national treatment to U.S. firms. They are also obligated to consider whether the parent country will permit U.S. banks to expand in that country even if the parent country determined that the U.S. denied its institutions national treatment. The amendment provides that any further differentiation of treatment between current particpants in the U.S. market and new entrants is permissible insofar as it is consistent with achieving the purposes of the Act. It is recognized that some foreign financial firms have made substantial investments in the United States and provide employment opportunities for American citizens. To achieve its market-opening purposes the bill provides the regulators with the flexibility to restrict new entrants from a foreign country before denying applications from entities already operating in the United States.

It also added a new section setting forth the purposes of the title which are to encourage foreign countries to offer United States financial firms that operate or seek to operate in those countries *de facto* national treatment that offers the same competitive opportunities (including effective market access) that are available to those countries domestic financial institutions, thereby ending discrimination against U.S. financial institutions.

The bill reported by the Committee also directs the Treasury Secretary and banking regulators to exercise their discretion under S. 2028 consistent with any obligations the United States assumes under bilateral or mutilateral agreements governing financial services entered into by the President and approved and implemented by the Congress. This provision is meant to apply to chapter 17 of the U.S.-Canada Free Trade Agreement which deals with financial services, or to an agreement pertaining to financial services similar to what is now being discussed in the Uruguay GATT Round. The provisions does not apply to the many treaties of friendship, commerce, and navigation now in effect, even if some such treaties have provisions dealing with financial services.

CONSTITUTIONALITY

During his April 5 testimony on S. 2028, Mr. Mulford informed the Committee that the Department of Justice had constitutional concerns about certain provisions which it would address in a separate letter. On April 30, 1990, Bruce Navarro, the Acting Assistant Attorney General for Legislative Affairs wrote to the Committee asserting that S. 2028's negotiation requirements ". . . impermissibly infringe upon the authority of the Executive to conduct negotiations with foreign countries." The letter quoted from *United States* v. *Cutriss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) to support that contention.

The Committee requested the American Law Division of the Congressional Research Service (CRS) to examine the constitutional concerns expressed by the Justice Department. A CRS memorandum of May 10, 1990, states that the Justice Department's reliance on *Curtiss-Wright* is misplaced and disregards a long history of laws giving negotiating authority to designated officials other than the President. The CRS memorandum confirmed the Committee's belief that the Justice Department's objections lack merit. Copies of the Department of Justice letter and the CRS memorandum are included as appendices to this report.

CONCLUSION

This bill adopts a reciprocal national treatment approach to trade in financial services for the United States. This approach reflects the views of the Banking Committee that the United States must be more insistent on equality of competitive opportunity for our financial firms abroad and more aggressive in international negotiations to achieve such equality. The Committee agrees with the thoughts expres-ed by Deputy Secretary of State Lawrence Eagleburger in a November 30, 1989, speech at the American Foreign Service Association.

> We as a government and as a society are going to have to acknowledge that our economic health and our ability totrade competitively on the world market may be the single most important component of our national security as we move into the next century.

This bill is designed as one small step in a series of measures that our nation will have to take to prepare itself for the new age of global economic competition.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section designates this Act as the "Fair Trade in Financial Services Act of 1990."

Section 2. Effectuating the principle of national treatment for banks and bank holding companies

This section adds a new section 15 to the International Banking Act of 1978, establishing a framework of negotiations, reports, and discretionary sanctions designed to help end discrimination against

U.S. banks and bank holding companies that operate or seek to operate abroad.

A. Purposes

Subsection (a) of new section 15 states the purpose of section 15: to encourage foreign countries to accord *de factor* national treatment to U.S. banks and bank holding companies that operate or seek to operate in those countries; and thus to help end discrimination against U.S. banks and bank holding companies. "Discrimination" in subsection (a)(2) refers to any failure to accord "national treatment," as defined in subsection (f).

B. Annual Reports Required

Subsection (b) requires the Secretary of the Treasury to report to Congress each year (1) identifying each foreign country that, according to the most recent national treatment study, does not accord *de facto* national treatment to U.S. banks and bank holding companies, and yet with respect to which no determination under subsection (d)(1) is in effect; (2) explaining why the Secretary has not made (or has rescinded) such a determination; and (3) describing the results of any negotiations conducted pursuant to subsection (c). Such a report is due by the May 1 following the year with which the report deals.

C. Negotiations Required

Subsection (c) generally requires the Secretary of the Treasury to initiate negotiations with any foreign country if: (1) according to the Treasury Department's most recent national treatment study, that country does not accord U.S. banks and bank holding companies *de facto* national treatment; and (2) the Secretary has not made (or has rescinded) a determination under subsection (d)(1) with respect to that country. The objective of the negotiations is to ensure that the foreign country accords *de facto* national treatment to U.S. banks and bank holding companies. However, the Secretary need not initiate such negotiations if the Secretary determines that they would be fruitless or would impair national economic interests, and gives written notice of that determination to the chairman and ranking minority member of the Senate and House Banking Committees.

D. Discretionary sanctions

1. General rule

Subsection (d)(1) authorizes certain sanctions against persons from countries that discriminate against U.S. banks and bank holding companies. The Secretary of the Treasury may open the way for such sanctions by publishing in the *Federal Register* a determination that a foreign country does not accord U.S. banks and bank holding companies *de facto* national treatment. The Federal banking agencies may then, in consultation with the Secretary of the Treasury, deny applications and disapprove notices filed by persons of that country.

Subsection (d)(1) authorizes the Federal banking agencies to deny applications and disapprove notices notwithstanding any inconsist-

ent statute, regulation, treaty, or international agreement. The only exception is for international agreements covered by subsection (h)(1). The phrase "notwithstanding any other provision of law," which appeared in some antecedents of this section such as section 909 of S. 1886 (100th Congress), was omitted from subsection (d)(1) as unnecessary. Thus, for example, applications may be denied and notices disapproved notwithstanding treaty provisions according persons of the foreign country in question "national treatment," "most-favored-nation treatment," or both.

Subsection (d)(1) applies to any application requiring the approval of a Federal banking agency, including an application to acquire shares of a bank or bank holding company; to effect a bank merger; to establish a branch, agency, or commerical lending company; to engage in a nonbanking activity; to establish an Edge Act or Agreement corporation; or to obtain Federal deposit insurance. Subsection (d)(1) likewise applies to any notice that is subject to disapproval by a Federal banking agency, such as a notice under the Change in Bank Control Act, and to any transaction covered by subsection(e).

Nothing in section 15 requires a Federal banking agency to consult with the Secretary of the Treasury about issues other than those relating to the exercise of the agency's discretion under that section.

2. Annual review

Subsection (d)(2) requires the Secretary of the Treasury to review annually any determination in effect under subsection (d)(1) and decide whether that determination should be rescinded. The objective is to avoid having a determination remain in effect through inertia when the reasons for the determination no longer exist.

If a Federal banking agency denied an application under subsection (d)(1) and the Secretary of the Treasury subsequently rescinded the determination on which the denial was based, the rescission would not grant the application, but would clear the way for a new application.

E. Preventing Existing Entities from Being Used to Evade This Section

1. General rule

Subsection (e)(1) creates a review procedure designed to prevent an existing bank, branch, agency, commerical lending company, or other affiliated entity from being used to evade sanctions under subsection (d)(1). If such an entity is a person of a country that the Secretary of the Treasury (acting under that subsection) has determined does not accord *de facto* national treatment to U.S. banks and bank holding companies, that entity generally may not, without prior apprvoval under subsection (e): (1) commence any line of businesss in which it was not engaged as of the date on which the Treasury Secretary's determination was published in the *Federal Register*; or (2) do business at any location at which it did not do business as of that date.

The term "line of business" is drawn from and intended to have the same meaning as in section 225.145(c) of title 12, Code of Federal Regulations. Thus, for example, the following are discrete lines of business: accepting demand deposits; accepting nondemand deposits that the depositor may withdraw by check or similar means for payment to third parties (e.g., NOW accounts); accepting savings deposits; commercial lending; consumer mortgage lending; consumer credit-card lending; other consumer lending; trust activities; discount securities brokerage; full-service securities brokerage; investment advisory services; and foreign exchange transaction services.

The prior-approval requirement does not apply to acquiring interests in companies that do not operate in the United States, as subsection (e)(1) by its terms applies only to commencing new lines of business and doing business from now locations "in the United States."

Subsection (e) is procedural: it creates a review procedure for certain transactions without specifying how a Federal banking agency should exercise its discretion with respect to those transactions.

2. Exception for transactions under section 2(h)(2)

Subsection (e)(2) specifically excepts from the prior-approval requirement transactions under section 2(h)(2) of the Bank Holding Commpany Act. Section 2(h)(2) permits a foreign bank or bank holding company principally engaged in banking outside the United States to acquire shares of a foreign company (the "investor company") also principally engaged in business outside the United States, and permits the investor company to acquire shares of any company engaged in the same general line of business as the investor company or a related line of business. Section 2(h)(3) prevents section 2(h)(2) from being used to hold shares of a company that engages in—or holds more than 5 percent of any class of voting securities of a company engaged in—any banking, securities, insurance, or other financial activities in the United States. Thus, because section 2(h)(2) cannot be used to conduct financial services, it does not raise those concerns about national treatment in financial services to which the bill is directed.

3. Review procedure

Subsection (e)(3) prescribes the review procedure applicable if three criteria are satisfied: (1) the entity in question is an uninsured State bank, an uninsured State branch, a State agency, or a commerical lending company; (2) the State requires that entity to obtain the prior approval of the State bank supervisor before commencing the new line of business or doing business from the new location in question; and (3) no provision of Federal law other than subsection (e) requires the entity to obtain the prior approval of a Federal banking agency before commencing that activity or doing business from that location. In all other cases subsection (e)(4) requires the entity in question to obtain the prior approval of the appropriate Federal banking agency. The effect of subsection (e)(3) is thus to coordinate the Federal review process with State prior-ap-

proval procedures in cases where there is currently no Federal prior-approval requirement.

4. Effect on other law

Subsection (e) does not preempt (or otherwise relieve the entity in question from) any otherwise-applicable requirement of Federal law. Nor does subsection (e) in any way limit a Federal banking agency's express or implicit authority to prevent evasions under other provisions of law.

F. National treatment defined

Subsection (f) defines "national treatment" as follows: a foreign country accords national treatment to U.S. banks and bank holding companies if it offers them the same competitive opportunities in that country (including effective market access) as are available there to that country's domestic banks and bank holding companies.

The definition is largely drawn from section 3502(b)(1) of the Omnibus Trade and Competitiveness Act of 1988, as well as section 601 of S. 1409 (reported by this Committee on June 23, 1987), sections 1501 and 1503 of the Senate amendment to H.R. 3 (adopted on July 21, 1987), and sections 909 and 910 of S. 1886 (passed by the Senate on March 30, 1988), all of the 100th Congress. The European Community's Second Banking Directive (adopted December 15, 1988) incorporated similar language.

The reference to "effective market access" is intended to emphasize that national treatment must be *de facto* as well as de jure; mere equality in the letter of the law will not suffice. That is what section 3502(b) and the Senate antecedents cited above meant by "the same competitive opportunities."

This Committee originated that phrase to encapsulate the guiding principle of the International Banking Act of 1978: national treatment to ensure equality of competitive opportunity. The Committee used "national treatment" to encompass that concept, in keeping with the opening paragraph of the Treasury Department's original national treatment study, which stated that the International Banking Act's guiding principle was "to provide 'national treatment' for foreign banks, *i.e.*, to accord foreign banks *equality of competitive opportunity* with their domestic counterparts in the U.S." *Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations* vii (1979) (italics in original). Indeed, "the same competitive opportunities" is itself a paraphrase of "equality of competitive opportunity." Thus the Committee, quoting from the Treasury's original study, described "national treatment" as follows:

> [N]ational treatment "afford(s) foreign banks equality of competitive opportunity vis-a-vis domestic institutions in similar circumstances." It "entails a pragmatic impact- or effects-oriented test for assessing the overall legal and regulatory climate affecting foreign banks in a given country. The test is met if foreign banks are allowed to compete on essentially equal terms with domestic institutions in the host country, even if some specific regulations or require-

ments applied to foreign banks differ from those affecting domestic banks."

S. Rep. No. 85, 100th Cong., 1st Sess. 42 (1987).

The conference committee on the Omnibus Trade and Competitiveness Act of 1988 took the same approach in discussing section 3502(b): "In the Conferees' view, a country accords national treatment to U.S. companies only if it accords them the same competitive opportunities as it accords to its domestic companies. National treatment requires a pragmatic, effect-oriented test for assuring that the same competitive opportunities exist." H. Rep. No. 576, 100th Cong., 2d Sess. 855 (1988).

The definition applies both to a U.S. banking organization's initial entry into a foreign country (sometimes referred to as its "establishment" there) and to its subsequent treatment in that country.

G. Person of a foreign country defined

Subsection (g) broadly defines a person of a foreign country as any person that (1) is organized under the laws of that country; (2) has its principal place of business in that country; (3) if an individual, is a citizen of or is domiciled in that country; or (4) is directly or indirectly controlled by any of the foregoing.

H. Exercise of discretion

1. International agreements

Subsection (h)(1) requires the Secretary of the Treasury and the Federal banking agencies, in exercising their discretion under section 15, to act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by Congress. Thus, for example, subsection (h)(1) covers the U.S.-Canada Free Trade Agreement and would cover any multilateral agreement governing financial services developed in the Uruguay Round of GATT negotiations, entered into by the President, and approved and implemented by Congress. Conversely, subsection (h)(1) would not apply to treaties of friendship, commerce, and navigation, even treaties that have some provisions dealing with financial services.

2. Factors to consider

Subsection (h)(2)(A) requires the Federal banking agencies, in exercising their discretion with respect to an entity that is a person of a foreign country and is already operating in the United States, to consider: (1) the extent to which that foreign country has a record of according national treatment to U.S. banks and bank holding companies; and (2) whether that country would permit U.S. banks and bank holding companies already operating in that country to expand their activities there even if that country determined that the United States did not accord national treatment to that country's banks and bank holding companies. Other appropriate factors may also be considered.

Under subsection (h)(2)(B), the Federal banking agencies have discretion to further differentiate between entities already operating in the United States and proposed new entrants, insofar as such differentiation is consistent with achieving the purposes of section 15, as set forth in subsection (a).

Section 3. Effectuating the principle of national treatment for securities brokers and dealers

This section adds a new paragraph (11) to section 15(b) of the Securities Exchange Act of 1934, creating a framework for securities brokers and dealers parallel to that for banks and bank holding companies under section 2 of the bill.

A. Purposes

Subparagraph (A) of new paragraph (11) states the purpose of the paragraph: to encourage foreign countries to accord *de facto* national treatment to U.S. brokers and dealers that operate or seek to operate in those countries; and thus to help end discrimination against U.S. brokers and dealers.

B. Annual reports required

Subparagraph (B) requires the Secretary of the Treasury to report to Congress each year (1) identifying each foreign country that, acording to the most recent national treatment study, does not accord *de facto* national treatment to U.S. brokers and dealers, and yet with respect to which no determination under subparagraph (D) is in effect; (2) explaining why the Secretary has not made (or has rescinded) such a determination; and (3) describing the results of any negotiations conducted pursuant to subparagraph (C). Such a report is due by the May 1 following the year with which the report deals.

C. Negotiations required

Subparagraph (C) generally requires the Secretary of the Treasury to initiate negotiations with any foreign country if: (1) according to the Treasury Department's most recent national treatment study, that country does not accord U.S. brokers and dealers *de facto* national treatment; and (2) the Secretary has not made (or has rescinded) a determination under subparagraph (D) with respect to that country. The objective of the negotiations is to ensure that the foreign country accords *de facto* national treatment to U.S. brokers and dealers. However, the Secretary need not initiate such negotiations if the Secretary determines that they would be fruitless or would impair national economic interests, and gives written notice of that determination to the chairman and ranking minority member of the Senate Banking Committee and the House Energy and Commerce Committee.

D. Discretionary sanctions

1. General rule

Subparagraph (D) authorizes certain sanctions against persons from countries that discriminate against U.S. brokers and dealers. The Secretary of the Treasury may open the way for such sanc-

tions by publishing in the *Federal Register* a determination that a foreign country does not accord U.S. brokers and dealers *de facto* national treatment. The Securities and Exchange Commission may then, in consultation with the Secretary of the Treasury, deny applications for registration as a broker or dealer filed by a person of that country, and prohibit any person of that country from acquiring control of a registered broker or dealer.

If the Secretary has published a determination under subparagraph (D) with respect to a given country, no person of that country may acquire control of any registered broker or dealer without giving the SEC at least 45 days notice of the proposed acquisition.

Subparagraph (D) authorizes the SEC to deny applications and disapprove notices notwithstanding any inconsistent statute, regulation, treaty, or international agreement. (The only exception is for international agreements covered by subparagraph (G)(i).) The phrase "Notwithstanding any other provision of law," which appeared in some antecedents of this section, was omitted from subparagraph (D) as unnecessary. Thus, for example, applications may be denied and notices disapproved notwithstanding treaty provisions according persons of the foreign country in question "national treatment," "most-favored-nation treatment," or both.

Nothing in paragraph (11) requires the SEC to consult with the Secretary of the Treasury about issues other than those relating to the exercise of the SEC's discretion under that paragraph.

2. Annual review

Subparagraph (D)(iv) requires the Secretary of the Treasury to review annually any determination in effect under subparagraph (D) and decide whether that determination should be rescinded. The objective is to avoid having a determination remain in effect through inertia when the reasons for the determination no longer exist.

E. National treatment defined

Subparagraph (E) defines "national treatment" as follows: a foreign country accords national treatment to U.S. brokers and dealers if it offers them the same competitive opportunities in that country (including effective market access) as are available there to that country's domestic brokers and dealers. This standard is discussed above in connection with section 2 of the bill.

F. Person of a foreign country defined

Subparagraph (F) broadly defines a person of a foreign country as any person that (1) is organized under the laws of that country; (2) has its principal place of business in that country; (3) if any individual, is domiciled in or a citizen of that country; or (4) is directly or indirectly controlled by any of the foregoing.

G. Exercise of discretion

1. International agreements

Subparagraph (G)(i) requires the Secretary of the Treasury and the SEC, in exercising their discretion under paragraph (11), to act

in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by Congress. Thus, for example, subparagraph (G)(i) covers the U.S.-Canada Free Trade Agreement and would cover any multilateral agreement governing financial services developed in the Uruguay Round of GATT negotiations, entered into by the President, and approved and implemented by Congress. Conversely, subparagraph (G)(i) would not apply to treaties of friendship, commerce, and navigation, even treaties that have some provisions dealing with financial services.

2. Factors to consider

Subparagraph (G)(i)(I) requires the SEC in exercising its discretion with respect to any entity that is a person of a foreign country and is already operating in the United States, to consider: (1) the extent to which that foreign country has a record of according national tratment to U.S. investment advisers; and (2) whether that country would permit U.S. investment advisers already operating in that country to expand their activities there even if that country determined that the United States did not accord national treatment to that country's investment advisers. Other appropriate factors may also be considered.

Under subparagraph (G)(ii)(II), the SEC may further differentiate between entities already operating in the United States and proposed new entrants, insofar as such differentiation is consistent with achieving the purposes of paragraph (11), as set forth in subparagraph (A).

Section 4: Effectuating the Principle of National Treatment for Investment Advisers

This section adds a new subsection (i) to section 203 of the Investment Advisers Act of 1940, creating a framework for investment advisers parallel to that for banks and bank holding companies under section 2 and securities brokers and dealers under section 3 of the bill.

A. Purposes

Paragraph (1) of new subsection (i) states the purpose of the subsection: to encourage foreign countries to accord *de facto* national treatment to U.S. investment advisers that operate or seek to operate in those countries; and thus to help end discrimination against U.S. investment advisers.

B. Annual Reports Required

Paragraph (2) requires the Secretary of the Treasury to report to Congress each year (1) identifying each foreign country that, according to the most recent national treatment study, does not accord *de facto* national treatment to U.S. investment advisers, and yet with respect to which no determination under paragraph (4) is in effect; (2) explaining why the Secretary has not made (or has rescinded) such a determination; and (3) describing the results of any

negotiations conducted pursuant to paragraph (3). Such a report is due by the May 1 following the year with which the report deals.

C. Negotiations required

Paragraph (3) generally requires the Secretary of the Treasury to initiate negotiations with any foreign country if: (1) according to the Treasury Department's most recent national treatment study, that country does not accord U.S. investment advisers *de facto* national treatment; and (2) the Secretary has not made (or has rescinded) a determination under paragraph (4) with respect to that country. The objective of the negotiations is to ensure that the foreign country accords *de facto* national treatment to U.S. investment advisers. However, the Secretary need not initiate such negotiations if the Secretary determines that they would be fruitless or would impair national economic interests, and gives written notice of that determination to the chairman and ranking minority member of the Senate Banking Committee and the House Energy and Commerce Committee.

D. Discretionary sanctions

1. General rule

Paragraph (4) authorizes certain sanctions against persons from countries that discriminate against U.S. investment advisers. The Secretary of the Treasury may open the way for such sanctions by publishing in the Federal Register a determination that a foreign country does not accord U.S. investment advisers *de facto* national treatment. The Securities and Exchange Commission may then, in consultation with the Secretary of the Treasury, deny applications and disapprove notices filed by persons of that country. Paragraph (4) applies to any application requiring the approval of the Commission, and any notice that is subject to disapproval by the Commission.

Paragraph (4) authorizes the SEC to deny applications and disapprove notices notwithstanding any inconsistent statute, regulation, treaty, or international agreement. The only exception is for international agreements covered by paragraph (7)(A). The phrase "notwithstanding any other provision of law," which appeared in some antecedents of this bill, was omitted from paragraph (4) as unnecessary. Thus, for example, applications may be denied and notices disapproved notwithstanding treaty provisions according persons of the foreign country in question "national treatment," "most-favored-nation treatment," or both.

Nothing in subsection (i) requires the SEC to consult with the Secretary of the Treasury about issues other than those relating to the exercise of the SEC's discretion under that subsection.

2. Annual review

Paragraph (4)(E) requires the Secretary of the Treasury to review annually any determination in effect under paragraph (4) and decide whether that determination should be rescinded. The objective is to avoid having a determination remain in effect through inertia when the reasons for the determination no longer exist.

E. National treatment defined

Paragraph (5) defines "national treatment" as follows: a foreign country accords national treatment to U.S. investment advisers if it offers them the same competitive opportunities in that country (including effective market access) as are available there to that country's domestic investment advisers. This standard is discussed above in connection with section 2 of the bill.

F. Person of a foreign country defined

Paragraph (6) broadly defines a person of a foreign country as any person that (1) is organized under the laws of that country; (2) has its principal place of business in that country; (3) if an individual, is a citizen of or is domiciled in that country; or (4) is directly or indirectly controlled by any of the foregoing.

G. Exercise of discretion

1. International agreements

Paragraph (7)(A) requires the Secretary of the Treasury and the SEC, in exercising their discretion under subsection (i), to act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by Congress. Thus, for example, paragraph (7)(A) covers the U.S.-Canada Free Trade Agreement and would cover any multilateral agreement governing financial services developed in the Uruguay Round of GATT negotiations, entered into by the President, and approved and implemented by Congress. Conversely, paragraph (7)(A) would not apply to treaties of friendship, commerce, and navigation, even treaties that have some provisions dealing with financial services.

2. Factors to consider

Paragraph (7)(B)(i) requires the SEC, in exercising its discretion with respect to an entity that is a person of a foreign country and is already operating in the United States, to consider: (1) the extent to which that foreign country has a record of according national treatment to U.S. investment advisers; and (2) whether that country would permit U.S. investment advisers already operating in that country to expand their activities there even if that country determined that the United States did not accord national treatment to that country's investment advisers. Other appropriate factors may also be considered.

Under paragraph (7)(B)(ii), the SEC may further differentiate between entities already operating in the United States and proposed new entrants, insofar as such differentiation is consistent with achieving the purposes of subsection (i), as set forth in paragraph (1).

Section 5. Conforming amendments specifying that national treatment includes effective market access

This section makes conforming amendments to three sections of current law.

A. Quadrennial reports on foreign treatment of United States financial institutions

Section 3602 of the Omnibus Trade and Competitiveness Act of 1988 requires the Secretary of the Treasury to report at least every four years on, *inter alia*, the extent to which foreign countries deny national treatment to U.S. banking and securities organizations. Subsection (a) adds a definition of national treatment consistent with that adopted in sections 2 and 3 of the bill: "a foreign country denies national treatment to United States entities unless it offers them the same competitive opportunities (including effective market access) as are available to its domestic entities."

B. Negotiations to provide fair trade in financial services

Section 3603(a)(1) of the Omnibus Trade and Competitiveness Act of 1988 directs the President or his designee to conduct discussions with foreign governments aimed at "ensuring that United States banking organizations and securities companies have access to foreign markets and receive national treatment in those markets." For consistency with sections 2, 3, and 4 of the bill, subsection (b) specifies that access must be "effective."

C. Primary dealers in Government debt instruments

Section 3502(b)(1) of the Omnibus Trade and Competitiveness Act of 1988 generally prohibits the Federal Reserve System from designating as a primary dealer in U.S. Government securities (or continuing any existing designation of) any person of a foreign country that "does not accord to United States companies the same competitive opportunities in the underwriting and distribution of government debt securities issued by such country as such country accords to domestic companies of such country." For consistency with sections 2 and 3 of the bill, subsection (c) specifies that "the same competitive opportunities" include "effective market access." As noted above in connection with section 2, this makes explicit in legislative language the original intent of section 3502(b)(1). In addition, subsection (c) makes two technical changes in phrasing: "accords to" becomes "offers"; and "as such country accords" becomes "as are available."

Subsection (c) affects only the definition of national treatment; it does not alter existing law—including the exemptions from and exceptions to section 3502(b)(1)—in any other respect.

REGULATORY IMPACT STATEMENT

Pursuant to rule XXVI, paragraph 11(b) of the Standing Rules of the Senate, the Committee has evaluated the regulatory impact of the bill and concludes that it will result in no net increase in the regulatory burden imposed by the Government. The Treasury Department and banking regulators are given discretionary authority to deny applications from foreign financial institutions from a country that does not grant U.S. financial institutions *de facto* national treatment. No action is required by the bill.

CHANGES IN EXISTING LAW

The Committee has determined that it is necessary, in order to expedite the business of the Senate, to dispense with the requirements of rule XXVI, paragraph 12, of the Standing rules of the Senate, with respect to this legislation.

COST OF LEGISLATION

The Committee has requested a cost estimate of this legislation under the provisions of Section 403 of the Congressional Budget Act of 1974. The cost estimate of the Congressional Budget Office appears below.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 10, 1990.

Hon. DONALD W. RIEGLE, Jr.,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2028, the Fair Trade in Financial Services Act of 1990, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs, May 24, 1990. This letter supersedes the CBO estimate dated June 28, 1990. We estimate that implementation of this bill would result in annual costs of $200,000 to $300,000 to the federal government during fiscal years 1991 through 1995 and in no significant cost to state or local governments.

Under current law, every four years the Secretary of the Treasury prepares a study that examines whether foreign countries provide U.S. banks and bank holding companies, securities brokers and dealers, and invesment advisers the same competitive opportunities that are available to their own domestic firms. This bill would authorize the Secretary to publish in the *Federal Register* a determination that a country does not provide such competitive opportunities. If the Secretary publishes such a determination for any country, the bill would authorize federal banking regulators and the Securities and Exchange Commission (SEC) to prohibit persons of that country from conducting certain financial service activities in the United States. With certain exceptions, the bill would require the Secretary to initiate negotiations with foreign countries identified in the quadrennial report as not providing competitive opportunities and for which the Secretary has not published a determination. Furthermore, the Secretary would be required to prepare an annual report identifying these countries, explaining why a determination has not been made or has been rescinded, and describing the results of negotiations.

Based on information from the Department of the Treasury, CBO estimates that the negotiations and annual reports required by the bill would cost $200,000 to $300,000 each year beginning in 1991, assuming appropriation of the necessary amounts. This sum would cover the costs of the additional staff and associated overhead expenses necessary to prepare the reports and conduct the negotiations. Provisions of the bill affecting the SEC and the banking reg-

ulatory agencies are not expected to result in significant additional costs.

State officials would be required to consult with federal banking agencies in reviewing applications by state-chartered branches and agencies of foreign banks whose home countries are found by the Secretary to not provide competitive opportunities for U.S. firms. States also would be required to forward to the federal agencies the record of each approved application. Based on information from the Conference of State Bank Supervisors, CBO estimates that implementation of these requirements would result in no significant cost to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Laura Carter and James Hearn, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

APPENDIX A

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, April 30, 1990.

Hon. DONALD W. RIEGLE,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on S. 2028, the "Fair Trade in Financial Services Act of 1990." This bill would amend the International Banking Act, 12 U.S.C. §3101 *et seq.*, to encourage the opening of foreign markets to United States firms that provide financial services.

In its current form, the bill contains two provisions that present serious constitutional concerns. Specifically, S. 2028 would add a new section 15 to the International Banking Act. Section 15(c)(1) would require the Secretary of the Treasury to initiate negotiations with certain foreign countries to ensure that they offer United States banks the same competitive opportunities as those countries provide for their domestic banks. Section 15(c)(2) would create an exception to this requirement, whereby the Secretary need not initiate negotiations if he "determines that [they] would be fruitless or would impair national economic interests" and if he "give[s] written notice of that determination" to certain congressional committees.

Similarly, S. 2028 would add a new section 15(b)(11) to the Securities Exchange Act. Section 15(b)(11)(D)(i) would require the Secretary of the Treasury to initiate negotiations with certain foreign countries to ensure that they offer United States brokers and dealers the same competitive opportunities as enjoyed by the brokers and dealers of those nations. Section 15(b)(11)(D)(ii) would create an exception to the negotiation requirement analogous to that with respect to negotiations over banks.

The negotiation requirements in S. 2028 impermissibly infringe upon the authority of the Executive to conduct negotiations with foreign nations. The Supreme Court has clearly stated:

> In th[e] vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As [then-Representative John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ

> of the nation in its external relations, and its sole representative with foreign nations."

United States v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936) (emphasis in original; citation omitted). A requirement that an Executive officer conduct negotiations with foreign nations concerning banks or brokers and dealers plainly would contravene this principle.

Although S. 2028 does provide an exception to each of its negotiation requirements, those exceptions are insufficient to make the bill constitutional, as they would not fully restore Executive authority. First, the exception is applicable only if negotiations would be "fruitless or would impair national economic interests." The President's authority to determine whether to negotiate, however, is plenary and cannot be circumscribed by criteria that Congress establishes.

Second, the exception is inconsistent with the secrecy with which the President may conduct negotiations. In *Curtiss-Wright*, the Supreme Court emphasized:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations. . . .

299 U.S. at 320–21. In light of these concerns, the Constitution provides that decisions concerning "the form of the President's action—*or, indeed, whether he shall act at all*" shall rest exclusively with the President. *Curtiss-Wright*, 299 U.S. at 321 (emphasis added). To avoid the negotiation requirements of the bill, the Secretary of the Treasury would be required to disclose whether he is negotiating with a foreign country, thus undermining the President's authority to keep secret the existence of negotiations.

These constitutional objections could be resolved by amending S. 2028 to make the negotiation provisions therein purely advisory.

However, amending the bill to address constitutional concerns would not alleviate the serious underlying problems previously identified by the Administration. On policy grounds, the Administration opposes S. 2028 because of its reciprocity language. We object to such language because of international obligations of the United States, and because of the risk that reciprocity would be used, leading to likely retaliation.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

BRUCE C. NAVARRO,
Acting Assistant Attorney General.

APPENDIX B

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, May 11, 1990.

To: Senate Committee on Banking, Housing, and Urban Affairs.
Attention: Mr. Raymond Natter.
From: American Law Division.
Subject: Analysis of Justice Department Constitutional Concerns Regarding the Fair Trade in Financial Services Act (S. 2028).

Your letter of May 1, 1990 to Mr. Joseph Ross, Director, Congressional Research Service, has been referred to us for an examination of the Justice Department's objections to the Fair Trade in Financial Services Act (S. 2028).

The legislation in question amends the International Banking Act of 1978, 12 U.S.C. 3101 *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78o(b), to encourage the opening of foreign markets to United States firms that provide financial services. In order to assure United States banks and holding companies and United States brokers and dealers the same competitive opportunities as are available to domestic counterparts, the Secretary of the Treasury would be required to initiate negotiations leading to the elimination of disparate treatment directed against Americans in this regard. However, there would be no obligation to initiate negotiations if the Secretary determines that "negotiations would be fruitless or would impair national economic interest" and "gives written notice of that determination" to the Senate and House Banking Committees.

The Justice Department's "constitutional concerns" are basically two fold: that the described negotiating requirements interfere with the President's monopoly to conduct foreign negotiations and compromises the need for secrecy that frequently attends and ensures success in reaching agreements with foreign nations. In support of its conclusions, Justice places exclusive reliance on *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and, in particular, the now familiar passage at page 319 of the opinion where Justice Sutherland contrasts the President's power to *negotiate* treaties with his power to *make* treaties. The former he does "alone" while the latter requires the advice and consent of the Senate.

With respect to the element of secrecy, Justice quotes another familiar passage from pages 319–320 of the opinion to the effect, previously indicated, that secrecy and success in negotiations "often" go hand in hand.

In our view the Justice Department's reliance on *Curtiss-Wright* is not so much misplaced as overly generous and, moreover, disregards a long record of laws which give negotiating authority to designated officials other than the President.

The *Curtiss-Wright* opinion's expansive view of presidential powers in the field of foreign affairs generally, and with respect to the conduct of negotiations in particular, are largely *dicta*. Entitled to respect and respected by the Senate since early on, especially insofar as the President being the spokesman or mouthpiece of the nation in foreign affairs, the facts of the case have little or nothing whatsoever to do with the conduct of negotiations or the need for secrecy in the conduct of negotiations. (See page 319 where the Court quotes a Report of the Committee on Foreign Relations, vol. 8, p. 24, in part, as follows: "The President is the constitutional representative of the United States with regards to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.") Indeed, the facts in *Curtiss-Wright* do not elicit much commentary on presidential foreign affairs powers.

At issue in the case was a *statute* making certain arms sales illegal upon a finding by the President that a ban on those sales would serve the cause of peace. President Roosevelt made the necessary finding. Curtiss-Wright violated the law, was indicted and convicted, and on appeal challenged the constitutionality of the law on the ground that it violated the delegation doctrine, that is, that open ended delegations of authority to executive officials run afoul of the constitutional grant of all legislative power to Congress. As one writer has recently suggested, the Court may have felt obligated to roam at large since six months earlier, for the first and last time in its history, it had invoked the doctrine to overturn a pair of New Deal anti-depression measures. *Panama Refining Company* v. *Ryan*, 293 U.S. 388 (1935) and *United States* v. *Schecter Poultry Corp.*, 295 U.S. 495 (1935). See Glennon, *Constitutional Diplomacy* 18 (1990). Be that as it may, the case has become a talisman invariably invoked by Administration spokespersons regardless of political affiliation in support of unlimited presidential discretion in the foreign affairs area.

Held to the precise facts of the case, *Curtiss-Wright* stands for the propositions that the statute in question did not constitute an illicit delegation of policy origination to the President and that delegations impacting on foreign affairs are not subject to the same exacting limitations as those affecting purely domestic concerns.

Not only is that case of questionable conclusive authority on all matters of presidential powers in the area of foreign affairs, including the conduct of negotiations and the need for secrecy in the conduct of negotiations, it offers little guidance with respect to the propriety of empowering executive branch officials other than the President to negotiate with foreign entities, especially to negotiate nonpolitical, statutorily delegated economic matters, for example. In this regard and with respect to the extent of the President's independent powers to negotiate, see *United States* v. *Guy W. Capps, Inc.*, 204 F. 2d 655 (4th Cir. 1953), *Aff'd on other grounds*, 348 U.S.

296 (1955). The court overturned an executive agreement between the United States and Canada concerning the export and import of potatoes that was inconsistent with the requirements of section 3 of the Agricultural Act of 1948, 62 Stat. 1248–50 (1948). The court held that Congress has the exclusive authority to regulate foreign commerce, and, accordingly, the President cannot make any agreements which are inconsistent with existing legislation.

Extreme interpretations of the significance of the *Curtiss-Wright* decision can lead to closing one's eyes to reality and to the lessons of history. In the first category, it should be noted that despite presidential forays into negotiations, so called summit meetings being the most glaring illustration, most negotiations are conducted by agents, principally, but no exclusively, State Department personnel. As negotiations increasingly deal with highly scientific subjects that fall outside traditional areas of State Department expertise, technical experts from other departments and agencies join in and become part of the negotiating team. Apparently something along these lines involving personnel of the Environmental Protection Agency took place in connection with recent United States negotiations with Canada.

The tendency to disperse negotiating authority throughout the Executive Branch has been noted by one commentator who explains the reasons for developments in this area as follows:

> The *raison d'etre* of upgraded agency-level agreements (and thus a dispersal throughout the Executive Branch of negotiating responsibilities, traditionally fulfilled by the Department of State,) has ultimately been the rapid integration of this nation into the world community. Perhaps more than any other factor, technological advances, primarily in transportation and communication have spurred the integration process, producing a world that is smaller, in effect, than ever before. Also, the continued expansion of foreign trade and investments by U.S. interests has caused an unprecedented level of economic interdependence with other countries. As a result, events—particularly of an economic, technological/scientific, military or environmental nature—occurring beyond the borders of the U.S. that once produced few domestic consequences are increasingly having a direct impact upon a wide range of private concerns and government agencies. This has caused successive administrations, as well as Congress, to conclude that the State Department's institutional focus on international politics and diplomacy is no longer sufficient alone to handle the many complex and technical issues of transnational domestic import that must be agreed to with other states. Thus, the nondiplomatic agencies in which expertise in these highly specialized areas resides have been relied upon increasingly in the negotiation of these types of agreements. Kuchenbecker, 18 *Columbia Journal of Transnational Law* 8–10 1979.

In addition to the reality that the overwhelming number of negotiations conducted on behalf of the United States are performed by presidential agents rather than by the President himself, Congress

from the beginning has vested negotiating authority in other executive officials. One of the earliest examples turned up by our research is the Act of February 20, 1792, An Act to establish the Post-Office and Post Roads within the United States. 1 Stat. 232 (1792). Section 26 of the 1792 law enabled the Postmaster General to deal with sea borne mail and, more significantly, gave him discretionary authority to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices." 1 Stat. 239.

Although the apparent successor of this early provision continues to authorize the Postal Service (now an independent establishment in the Executive Branch, not a cabinet level department) with discretionary authority to negotiate postal arrangements "with the consent of the President", 39 U.S.C. 407, the actions of the Second Congress have significance for reasons "repeatedly" noted by the Supreme Court. "We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. . . . This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States*, 272 U.S. 52, 174-75 (1926).

The precedent seemingly established by the Second Congress in giving executive officials negotiating authority has contemporary analogues. While time does not permit a definitive listing of all such provisions, current and/or historical, we note the following examples: the United States Trade Representative has the "lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations, including commodity and direct investment negotiations, in which the United States participates", 19 U.S.C. 2171(c)(1)(C); the Secretaries of Transportation and Commerce, with the advice of the Secretary of State, had and may continue to have a role in "negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services", 49 U.S.C. 1462, and 49 U.S.C. App. 1301 for transfer of functions; the Chief of the Weather Bureau, under the direction of the Secretary of Commerce, among other things, was directed to "establish and coordinate the international exchanges of meteorological information required for the safety and efficiency of air navigation" and "participate in the development of an international basic meteorological reporting network, including the establishment, operation, and maintenance of reporting stations on the high seas, in polar regions, and in foreign countries in cooperation with other governmental agencies of the United States and the meteorological services of foreign countries and with persons engaged in air commerce, 49 U.S.C. 1463 and 49 U.S.C. 1301; the Secretary of State, in consultation with the Secretaries of Defense and Commerce, and the heads of other appropriate departments and agencies, "shall be

responsible for conducting negotiations with other countries, including those countries not participating in the group known as the Coordinating Committee, regarding their cooperation in restricting the export of goods and technology" "which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States . . .", 50 U.S.C. App. 2404(k); the Treasury Department's Office of the Assistant Secretary (Tax Policy) conducts various functions relating to international tax policies and programs, including participation in international tax treaty negotiations and in maintenance of relations with international organizations in tax matters. *U.S. Government Manual 1988-89* at 483.

These precedents have one element in common, namely, they give authority to conduct negotiations to an executive official subject ultimately to presidential control. The Secretary of the Treasury who would negotiate for fair trade in financial services under the Fair Trade in Financial Service Act of 1990 is just such an officer. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 444-445 (1977), where the Court held that the retention of a function within the Executive Branch but outside the Oval Office did not cause disruption and, thus, did not violate separation of powers.

A copy of the previously mentioned Kuchenbecker commentary relating to the growing practice of agency-level executive agreement is annexed hereto.

RAYMOND J. CELADA,
Senior Specialist in American Public Law.

[S. 2028, 101st Cong., 2d Sess.]

A BILL To amend the International Banking Act of 1978 and the Securities Exchange Act of 1934 to provide for fair trade in financial services

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Trade in Financial Services Act of 1990".

SEC. 2. EFFECTUATING THE PRINCIPLE OF NATIONAL TREATMENT FOR BANKS AND BANK HOLDING COMPANIES.

The International Banking Act of 1978 (12 U.S.C. 3101 et seq.) is amended by adding at the end the following:

"NATIONAL TREATMENT

"SEC. 15. (a) PURPOSES.—This section is intended to—

"(1) encourage foreign countries to accord national treatment to United States banks and bank holding companies that operate or seek to operate in those countries; and

"(2) seek an end to discrimination against United States banks and bank holding companies.

"(b) ANNUAL REPORTS REQUIRED.—For each calendar year beginning on or after January 1, 1991, the Secretary of the Treasury shall, not later than May 1 of the following calendar year, submit to the Congress a report—

"(1) identifying each foreign country—

"(A) that, according to the most recent report submitted under section 3602 of the Omnibus Trade and Competitiveness Act of 1988, does not accord national treatment to United States banks and bank holding companies; and

"(B) with respect to which no determination under subsection (d)(1) is in effect;

"(2) explaining why the Secretary has not made, or has rescinded, such a determination with respect to that country; and

"(3) describing the results of negotiations conducted pursuant to subsection (c)(1).

"(c) NEGOTIATIONS REQUIRED.—

"(1) IN GENERAL.—The Secretary of the Treasury shall initiate negotiations with any foreign country described in subparagraphs (A) and (B) of subsection (b)(1) to ensure that that country accords national treatment to United States banks and bank holding companies.

"(2) NEGOTIATIONS NOT REQUIRED.—Paragraph (1) does not require the Secretary of the Treasury to initiate negotiations with a foreign country if the Secretary—

"(A) determines that such negotiations would be fruitless or would impair national economic interests; and

"(B) gives written notice of that determination to the chairman and ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

"(d) DISCRETIONARY SANCTIONS.—

"(1) IN GENERAL.—A Federal banking agency may, in consultation with the Secretary of the Treasury, deny an application, and disapprove any notice, filed by a person of a foreign country if the Secretary has published in the Federal Register (and has not rescinded) a determination that the foreign country does not accord national treatment to United States banks and bank holding companies.

"(2) REVIEW.—The Secretary of the Treasury shall annually review any determination under paragraph (1) and decide whether that determination should be rescinded.

"(e) PREVENTING EXISTING ENTITIES FROM BEING USED TO EVADE THIS SECTION.—

"(1) IN GENERAL.—If a determination under subsection (d)(1) is in effect with respect to a foreign country, no bank, foreign bank described in section 8(a), branch agency, commercial lending company, or other affiliated entity that is a person of that country shall, without prior approval pursuant to paragraph (3) or (4), directly or indirectly, in the United States—

"(A) commence any line of business in which it was not engaged as of the date on which that determination was published in the Federal Register; or

"(B) conduct business from any location at which it did not conduct business as of that date.

"(2) EXCEPTION.—Paragraph (1) shall not apply with respect to transactions under section 2(h)(2) of the Bank Holding Company Act of 1956.

"(3) STATE-SUPERVISED ENTITIES.—

"(A) This paragraph shall apply if—

"(i) the entity in question is an uninsured State bank or branch, a State agency, or a commercial lending company;

"(ii) the State requires the entity to obtain the prior approval of the State bank supervisor before engaging in the activity described in subparagraph (A) or (B) of paragraph (1); and

"(iii) no other provision of Federal law requires the entity to obtain the prior approval of a Federal banking agency before engaging in that activity.

"(B) The State bank supervisor shall consult about the application with the appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act). If the State bank supervisor approves the application, the supervisor shall notify the appropriate Federal banking agency and provide the agency with a copy of the record of the application. During the 45-day period beginning on the date on which the appropriate Federal banking agency receives the record, the agency may, after consultation with the State bank supervisor, issue an order disapproving the activity in question. The period for disapproval under the preceding sentence may, in the agency's discretion, be extended for not more than 45 days.

"(4) FEDERAL APPROVAL.—If the transaction is not described in paragraph (3)(a), the entity in question shall obtain the prior approval of the appropriate Federal banking agency.

"(5) INFORMING STATE SUPERVISORS.—The Secretary of the Treasury shall inform State bank supervisors of any determination under subsection (d)(1).

"(6) EFFECT ON OTHER LAW.—Nothing in this subsection shall be construed to relieve the entity in question from any otherwise applicable requirement of Federal law.

"(f) NATIONAL TREATMENT DEFINED.—A foreign country accords national treatment to United States banks and bank holding companies if it offers them the same competitive opportunities (including effective market access) as are available to its domestic banks and bank holding companies.

"(g) PERSON OF A FOREIGN COUNTRY DEFINED.—A person of a foreign country is a person that—

"(1) is organized under the laws of that country;

"(2) has its principal place of business in that country;

"(3) in the case of an individual—

"(A) is citizen of that country, or

"(B) is domiciled in that country; or

"(4) is directly or indirectly controlled by a person described in paragraph (1), (2), or (3).

"(h) EXERCISE OF DISCRETION.—In exercising discretion under this section—

"(1) the Secretary of the Treasury and the Federal banking agencies shall act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by the Congress; and

"(2) the Federal banking agencies, in consultation with the Secretary of the Treasury—

"(A) shall consider, with respect to a bank, foreign bank, branch agency, commercial lending company, or other affiliated entity that is a person of a foreign country and is already operating in the United States—

"(i) the extent to which that foreign country has a record of according national treatment to United States banks and bank holding companies; and

"(ii) whether that country would permit United States banks and bank holding companies already operating in that country to expand their activities in that country even if that country determined that the United States did not accord national treatment to that country's banks and bank holding companies; and

"(B) may further differentiate between entities already operating in the United States and entities that are not already operating in the United States, insofar as such differentiation is consistent with achieving the purposes of this section.".

SEC. 3. EFFECTUATING THE PRINCIPLE OF NATIONAL TREATMENT FOR SECURITIES BROKERS AND DEALERS

Section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) is amended by adding at the end the following new paragraph:

"(11) NATIONAL TREATMENT.—(A) This paragraph is intended to encourage foreign countries to—

"(i) accord national treatment to United States brokers and dealers that operate or seek to operate in those countries; and

"(ii) seek an end to discrimination against United States brokers and dealers.

"(B) For each calendar year beginning on or after January 1, 1991, the Secretary of the Treasury shall, not later than May 1 of the following calendar year, submit to the Congress a report—

"(i) identifying each foreign country—

"(I) that, according to the most recent report submitted under section 3602 of the Omnibus Trade and Competitiveness Act of 1988, does not accord national treatment to United States brokers and dealers; and

"(II) with respect to which no determination under subparagraph (D)(i) is in effect;

"(ii) explaining why the Secretary has not made, or has rescinded, such a determination with respect to that country; and

"(iii) describing the results of negotiations conducted pursuant to subparagraph (C)(i).

"(C)(i) The Secretary of the Treasury shall initiate negotiations with any foreign country described in subclauses (I) and (II) of subparagraph (B)(i) to ensure that that country accords national treatment to United States brokers and dealers.

"(ii) Clause (i) does not require the Secretary of the Treasury to initiate negotiations with a foreign country if the Secretary—

"(I) determines that such negotiations would be fruitless or would impair national economic interests; and

"(II) gives written notice of that determination to the chairman and ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Energy and Commerce of the House of Representatives.

"(D) The following provisions shall apply if the Secretary of the Treasury has published in the Federal Register (and has not rescinded) a determination that a foreign country does not accord national treatment to United States brokers and dealers:

"(i) The Commission may, in consultation with the Secretary of the Treasury—

"(I) deny any application for registration under this subsection filed by a person of that foreign country; and

"(II) prohibit any person of that foreign country from acquiring control of a registered broker or dealer, irrespective of when the acquisition was initiated.

"(ii) No person of that foreign country, acting directly or indirectly, shall acquire control of any registered broker or dealer unless—

"(I) the Commission has been given notice 45 days in advance of the acquisition, in such form as the Commission shall prescribe by rule; and

"(II) the Commission has not prohibited the acquisition.

"(iii) The Commission may, by order, extend the notice period with respect to any particular acquisition for not more than 60 days.

"(iv) The Secretary of the Treasury shall annually review any determination under this subparagraph and decide whether that determination should be rescinded.

"(E) A foreign country accords national treatment to United States brokers and dealers if it offers them the same competitive opportunities (including effective market access) as are available to its domestic brokers and dealers.

"(F) A person of a foreign country is a person that—

"(i) is organized under the laws of that country;

"(ii) has its principal place of business in that country;

"(iii) in the case of an individual—

"(I) is a citizen of that country, or

"(II) is domiciled in that country; or

"(iv) is directly or indirectly controlled by a person described in clause (i), (ii), or (iii).

"(G) In exercising discretion under this paragraph—

"(i) the Secretary of the Treasury and the Commission shall act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by the Congress; and

"(ii) the Commission, in consultation with the Secretary of the Treasury—

"(I) shall consider, with respect to a broker or dealer that is a person of a foreign country and is already operating in the United States—

"(aa) the extent to which that foreign country has a record of according national treatment to United States brokers and dealers; and

"(bb) whether that country would permit United States brokers or dealers already operating in that country to expand their activities in that country even if that country determined that the United States did not accord national treatment to that country's brokers or dealers; and

"(II) may further differentiate between entities already operating in the United States and entities that are not already operating in the United States, insofar as such differentiation is conisstent with achieving the purposes of this paragraph.".

SEC. 4. EFFECTUATING THE PRINCIPLE OF NATIONAL TREATMENT FOR INVESTMENT ADVISERS.

Section 203 of the Investment Advisers Act of 1940 (12 U.S.C. 80b-3) is amended by adding at the end the following new subsection:

"(i) NATIONAL TREATMENT.—

"(1) PURPOSES.—This subsection is intended to encourage foreign countries to—

"(A) accord national treatment to United States investment advisers that operate or seek to operate in those countries; and

"(B) seek an end to discrimination against United States investment advisers.

"(2) ANNUAL REPORTS REQUIRED.—For each calendar year beginning on or after January 1, 1991, the Secretary of the Treasury shall, not later than May 1 of the following calendar year, submit to the Congress a report—

"(A) identifying each foreign country—

"(i) that, according to the most recent report submitted under section 3602 of the Omnibus Trade and Competitiveness Act of 1988, does not accord national treatment to United States investment advisers; and

(ii) with respect to which no determination under paragraph (4) is in effect;

"(B) explaining why the Secretary has not made, or has rescinded, such a determination with respect to that country; and

"(C) describing the results of negotiations conducted pursuant to paragraph (3)(A).

"(3) NEGOTIATIONS REQUIRED.—(A) The Secretary of the Treasury shall initiate negotiations with any foreign country described in clauses (i) and (ii) of paragraph (2)(A) to ensure that that country accords national treatment to United States investment advisers.

"(B) Subparagraph (A) does not require the Secretary of the Treasury to initiate negotiations with a foreign country if the Secretary—

"(i) determines that such negotiations would be fruitless or would impair national economic interests; and

"(ii) gives written notice of that determination to the chairman and ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Energy and Commerce of the House of Representatives

"(4) DISCRETIONARY SANCTIONS.—The following provisions shall apply if the Secretary of the Treasury has published in the Federal Register (and has not rescinded) a determination that a foreign country does not accord national treatment to United States investment advisers:

"(A) The Commission may, in consultation with the Secretary of the Treasury, deny any application, and disapprove any notice, filed pursuant to this title by a person of that foreign country.

"(B) The Commission may, in consultation with the Secretary of the Treasury, prohibit any person of that foreign country from acquiring control of a registered investment adviser, irrespective of when the acquisition was initiated.

"(C) No person of that foreign country, acting directly or indirectly, shall acquire control of any registered investment adviser unless—

"(i) the Commission has been given notice 45 days in advance of the acquisition, in such form as the Commission shall prescribe by rule; and

"(ii) the Commission has not prohibited the acquisition.

"(D) The Commission may, by order, extend the notice period with respect to any particular acquisition for not more than 60 days.

"(E) The Secretary of the Treasury shall annually review any determination under this paragraph and decide whether that determination should be rescinded.

"(5) NATIONAL TREATMENT DEFINED.—A foreign country accords national treatment to United States investment advisers if it offers them the same competitive opportunities (including effective market access) as are available to its domestic investment advisers.

"(6) PERSON OF A FOREIGN COUNTRY DEFINED.—A person of a foreign country is a person that—

"(A) is organized under the laws of that country;

"(B) has its principal place of business in that country;

"(C) in the case of an individual—

"(i) is a citizen of that country, or

"(ii) is domiciled in that country; or

"(D) is directly or indirectly controlled by a person described in subparagraph (A), (B), or (C).

"(7) EXERCISE OF DISCRETION.—In exercising discretion under this subsection—

"(A) the Secretary of the Treasury and the Commission shall act in a manner consistent with the obligations of the United States under a bilateral or multilateral agreement governing financial services entered into by the President and approved and implemented by the Congress; and

"(B) the Commission, in consultation with the Secretary of the Treasury—

"(i) shall consider, with respect to an investment adviser that is a person of a foreign country and is already operating in the United States—

"(I) the extent to which that foreign country has a record of according national treatment to United States investment advisers; and

"(II) whether that country would permit United States investment advisers already operating in that country to expand their activities in that country even if that country determined that the United States did not accord national treatment to that country's investment advisers;

"(ii) may further differentiate between entities already operating in the United States and entities that are not already operating in the United States, insofar as such differentiation is consistent with achieving the purposes of this subsection.".

SEC. 5. CONFORMING AMENDMENTS SPECIFYING THAT NATIONAL TREATMENT INCLUDES EFFECTIVE MARKET ACCESS.

(a) QUADRENNIAL REPORTS ON FOREIGN TREATMENT OF UNITED STATES FINANCIAL INSTITUTIONS.—Section 3602 of the Omnibus Trade and Competitiveness Act of 1988 (22 U.S.C. 5352) is amended—

(1) in paragraph (3), by striking "and securities companies" and inserting ", securities companies, and investment advisers"; and

(2) by adding at the end the following: "For purposes of this section, a foreign country denies national treatment to United States entities unless it offers them the same competitive opportunities (including effective market access) as are available to its domestic entities.".

(d) NEGOTIATIONS TO PROMOTE FAIR TRADE IN FINANCIAL SERVICES.—Section 3603(a)(1) of the Omnibus Trade and Competitiveness Act of 1988 (22 U.S.C. 5353(a)(1)) is amended by inserting "effective" after "banking organizations and securities companies have".

(c) PRIMARY DEALERS IN GOVERNMENT DEBT INSTRUMENTS.—Section 3502(b)(1) of the Omnibus Trade and Competitiveness Act of 1988 (22 U.S.C. 5342) is amended—

(1) by striking "does not accord to" and inserting "does not offer";

(2) by inserting "(including effective market access)" after "the same competitive opportunities in the underwriting and distribution of government debt instruments issued such country"; and

(3) by striking "as such country accords to" and inserting "as are available to".

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